

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

**BRIEF OF AMICUS CURIAE
THE JEWISH ADVOCACY CENTER
In Support of Petitioner**

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QUESTION PRESENTED

Whether the First and Fourteenth Amendments to the United States Constitution prohibit states from enacting criminal statutes which authorize increased maximum penalties for crimes in which the perpetrator intentionally selected a crime victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.

INTEREST OF THE AMICUS CURIAE

The Jewish Advocacy Center, founded in 1982, is a non-profit, tax-exempt, civil rights organization dedicated to fighting bigotry against all persons and to combatting anti-Semitism in particular. The Jewish Advocacy Center has been at the forefront of litigation on behalf of Jews and others to secure

fundamental constitutional rights in cases of unfair discrimination. The Center's focus is on bringing lawsuits for monetary damages against the perpetrators of bias-motivated violence. Awards of damages serve to compensate victims, punish perpetrators, and send the important message that discriminatory crime will not be condoned.

Nationwide, there has been a disturbing increase in the commission of so called "hate crimes" - crimes perpetrated against individuals because of the victims' actual or perceived race, religion, color, sexual orientation or national origin. Hate crimes represent a unique evil in society because of their particularly pervasive impact. A crime committed against an individual because of the

perception that the victim belongs to a certain group is, in essence, a crime committed against the entire group. The result is that whole groups of citizens feel intimidated, threatened and vulnerable to random acts of violence. Bias-motivated crimes not only have the effect of generating fear in all group members, but they tend to provoke retaliation as well. A potential consequence of crimes motivated by racial, religious or ethnic animus is that individual conflicts may escalate into large-scale disturbances, fragmenting what were once viable, cohesive communities.

Today, 46 states and the District of Columbia have legislation designed to punish hate crimes. *Brief of Amici Curiae The Anti-Defamation League, et al. in Support of Petitions for Writ of Certiorari to the Supreme*

Courts of Wisconsin and Ohio, p.4. The Wisconsin penalty enhancement statute at issue in this case seeks to redress the hate crime problem by authorizing increased maximum penalties for otherwise criminal conduct if the perpetrator intentionally selected a victim because of that person's race, religion, color or other listed characteristic. As a representative of those directly harmed by hate crimes, the Center has a substantial interest in seeing that perpetrators of bias motivated crimes are punished on all levels - civilly, through awards of monetary damages and criminally, through increased fines and sentences.

Given the Jewish Advocacy Center's firm commitment to fight against religious, racial and ethnic discrimination and violence, the Center is

deeply concerned with the outcome of *State of Wisconsin v. Mitchell*. Statutes authorizing enhanced punishment for bias offenses are essential weapons in the war against bigotry and discrimination. They send the emphatic message that discriminatory conduct will not be tolerated. Hate crimes statutes also provide greater public protection by deterring discriminatory violence. The Jewish Advocacy Center is a staunch supporter of hate crimes legislation in general and of the Wisconsin penalty enhancement statute in particular. It seeks to demonstrate that criminal statutes which provide for enhanced penalties when there is discrimination in the victim selection process are constitutional under the First Amendment.

STATEMENT OF FACTS

The relevant facts were laid out by the Wisconsin Supreme Court in *State of Wisconsin v. Mitchell*, 485 N.W.2d 807, 809 (1992):

The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Riddick, a fourteen-year-old white male, approached the apartment complex. Riddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him."

Mitchell then counted to three and pointed the group in Riddick's direction.

The group ran towards Riddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Riddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

Mitchell was convicted of aggravated battery as a party to the crime. The jury separately found, under the Wisconsin penalty enhancement statute (1989-1990), that Mitchell intentionally selected Riddick as a victim because of Riddick's race. The aggravated battery charge carried a maximum sentence of two years. But because the jury found that Mitchell intentionally selected the victim because of his race, the penalty

enhancer operated to increase the available maximum sentence for aggravated battery to seven years. The trial court imposed a four year sentence on Mitchell for the battery of Gregory Riddick.

SUMMARY OF THE ARGUMENT

The remedy to the evils of bigoted and prejudicial speech is education and expressions of tolerance. But the means for fighting acts of discrimination are laws that punish discriminatory conduct. When a perpetrator intentionally selects a crime victim because of that victim's race, religion, color, disability, sexual orientation, national origin or ancestry, the offender commits an act of discrimination. The Wisconsin penalty enhancement statute punishes

criminal offenders who discriminate in the selection of victims. It authorizes increased maximum penalties for otherwise criminal conduct if the perpetrator intentionally selected a crime victim because of that person's race, religion or other listed characteristic.

A crime committed against an individual because of the victim's perceived or actual membership in a certain group is, in essence, a crime committed against the entire group and against the community. Bias-motivated crimes have the effect of generating fear in all group members and disturb the fabric of a pluralistic society. Hate crimes are a burgeoning problem on the American scene. They threaten the comity of the community and profoundly undermine our democracy. The Wisconsin

statute redresses the hate crimes problem by punishing discrimination in the selection of victims.

The Wisconsin law does not punish thought or speech. It does not make bigoted expression a crime, nor does it penalize individuals for expressing bias through legal channels. Rather, the statute confronts the larger social problem of the perpetration of criminal acts against individuals because of their perceived or actual membership in certain groups. The penalty enhancer only punishes those who act on their bias by committing criminal acts and discriminating in the selection of victims. The Wisconsin law thus leaves bigots free to spew their hatred through legal means. People who hate are not punished by the penalty enhancer. People who act on their

hatred in a criminal manner are penalized.

Unlike the hate crimes statute in *R.A.V. v. City of St. Paul, Minnesota*, which was struck down as an unconstitutional, content-based restriction of speech, the Wisconsin statute is not directed at the substance of speech. And, in harmony with other constitutionally valid antidiscrimination statutes, the penalty enhancer punishes discriminatory action, not biased thought. Because the Wisconsin statute does not punish expression, but is directed at a perpetrator's act of discrimination in selecting a crime victim, the law is constitutionally valid under the First Amendment.

ARGUMENT

I. THE WISCONSIN PENALTY ENHANCEMENT STATUTE IS VALID UNDER THE FIRST AMENDMENT BECAUSE IT DOES NOT PUNISH THOUGHT OR EXPRESSION, BUT IS DIRECTED AT A PERPETRATOR'S ACT OF DISCRIMINATION IN SELECTING A CRIME VICTIM.

As applied to defendant Todd Mitchell prior to its amendment, the Wisconsin penalty enhancement statute permitted the imposition of increased maximum penalties for all crimes in the Wisconsin Criminal Code if a fact-finder determined, beyond a reasonable doubt, that a perpetrator "intentionally selected" the person against whom the crime was committed or selected the property which was damaged "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that

property." Wis. Stat. Section 939.645(1)(b)

The purpose of the statute is to provide more severe penalties for otherwise criminal conduct when the perpetrator selects his or her crime victim because of that victim's race, religion, color or other listed characteristic. In other words, just as there are laws that prohibit discrimination in hiring, firing, education, public accommodations and housing, this law punishes discrimination in the selection of a crime victim. The statute seeks to deter the commission of so called "hate crimes" - acts of violence and other crimes perpetrated against individuals because of their immutable characteristics or their perceived or actual membership in certain groups.

Hate crimes are particularly destructive to society because of their pervasive impact. A crime committed against an individual because of the perception that the victim belongs to a certain group is, in essence, a crime committed against the entire group. Consequently, whole groups of citizens are put in fear of random attacks from perpetrators with whom they have no relationship. Bias-motivated crimes not only have the effect of generating fear in all group members, but they have a tendency to provoke retaliation. A potential consequence of crimes motivated by racial, religious or ethnic animus is that individual conflicts may escalate into large-scale disturbances, fragmenting what were once viable, cohesive communities.

Thus, when an offender selects a victim because of the perception that the victim belongs to a specified group, the perpetrator creates a unique and greater harm to society than would be the case were the offender to choose a victim based on individual animosity or arbitrariness. The Wisconsin penalty enhancement statute is directed at punishing offenders who, by their act of discrimination in the selection of victims, create distinct dangers to society. Under the Wisconsin Criminal Code, if a perpetrator commits a battery which was motivated by racial hatred, the offender is charged for the harm caused to that particular victim. The perpetrator is punished for the crime of battery committed against the individual. But the Criminal Code does not penalize the offender for the unique danger he or she created to

society by discriminating in the selection of a victim. The Wisconsin penalty enhancement statute punishes this act of discrimination. Absent the penalty enhancer, the offender would be punished for the battery, but not for his or her act of discrimination which poses special threats to the community. By enacting section 939.645, the legislature simply intended to ensure that both the underlying crime and the larger act of discrimination would be penalized.

The act of discrimination targeted by the Wisconsin penalty enhancer and the harm that the statute seeks to redress become clearer on consideration of the following example. Assume, for instance, that a group of neo-Nazis are walking home late one evening after celebrating the initiation of a new

member. Still reveling and carousing in the streets, one member picks up a brick and hurls it through an apartment window. Unbeknownst to him, the apartment is owned by a Russian immigrant. The brick throwing member may be prosecuted for criminal damage to property. But the penalty enhancer could not be applied. There is no evidence that the crime victim was intentionally selected because of that victim's national origin.

Now, changing the scenario, assume that just prior to hurling the brick, the neo-Nazi member shouts: "Go home filthy immigrants!" Word of this incident would engender fear among the entire immigrant community. This is precisely the effect of discriminatory victim selection that the Wisconsin statute seeks to address. The penalty

enhancer may be applied in this instance, not because the neo-Nazi shouted a malicious epithet, and not in order to punish his bigoted speech, but because the neo-Nazi member acted on his bias by committing a criminal act and discriminating in the selection of his victim. Because choosing a victim on account of that person's race, religion and the like is more pernicious to society than when the victim is selected out of individual animosity or capriciousness, the legislature logically imposed a stiffer penalty. Crimes causing greater harm justify the imposition of greater punishment.

The Wisconsin penalty enhancement statute does not punish expression. It does not attempt to "drive certain ideas or viewpoints from the

marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, __ U.S. __, __, 112 S. Ct. 501, 508 (1991). What is penalized by the enhancer is the action of discriminating against another person through the perpetration of a criminal act. The statute is not aimed at either thought or speech. And, as the Court reasoned in *R.A.V. v. City of St. Paul, Minnesota*, __ U.S. __, 112 S. Ct. 2538, 2546-47 (1992), "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."

The proscribed conduct, itself, "intentionally selecting" a victim "because of" that person's characteristics, cannot reasonably be

construed as expression. Picking out an individual to victimize because of that person's status is action based on thought. For example, having in mind the idea that blacks and whites should not intermingle socially and that blacks should be beaten for doing so is, of course, pure thought protected by the First Amendment. Observing an interracial couple and feeling angered is, similarly, thought protected by the Constitution. Shouting racial slurs at a black man walking hand in hand with a white woman may also be protected speech. However, intentionally selecting to batter this man because of his race is an act of discrimination motivated by prejudicial thought. Intentional selection of a victim on account of that person's status is discrimination, not expression. Because the Wisconsin statute punishes

the act of discrimination in the victim selection process and not speech, it does not violate the freedom of expression guaranteed by the First Amendment.

In the case at hand, the prosecution successfully proved that Mitchell, an Afro-American, "intentionally selected" his victim "because of" that person's race under section 939.645. The state introduced provocative and inflammatory statements made by Mitchell to other blacks concerning white people prior to the battery of a white boy. Specifically, Mitchell asked a group of blacks: "Do you all feel hyped up to move on some white people?" And, on spotting a white boy, Mitchell urged, "You all want to fuck somebody up? There goes a white boy; go get him." *State of*

Wisconsin v. Mitchell, 485 N.W.2d 807, 809 (1992). Although the commission of an aggravated battery carries a maximum two-year sentence in Wisconsin, under the penalty enhancer, the maximum sentence was increased by five years. As a result, the judge was left free to impose a prison sentence of up to seven years against Mitchell.

Counsel for Mitchell contends, and the Supreme Court of Wisconsin held, that section 939.645 punishes bigoted thought in violation of the First Amendment because the underlying crime of aggravated battery is already punishable under the Wisconsin Criminal Code. Respondent's *Petition for a Writ of Certiorari to the Supreme Court of Wisconsin*, p.5-6, *State of Wisconsin v. Mitchell*, 485 N.W.2d 807, 812 (1992). The penalty enhancer thus

operated to increase Mitchell's punishment for battery solely because of his racist expression preceeding the crime. *Id.* The rationale is as follows. Defendant's speech was used to prove that he intentionally selected his victim because of that victim's race. Intentional selection translated into a greater penalty for Mitchell. Therefore, Mitchell was, in essence, punished for his racist speech. More generally the contention is that all crimes that fall within the scope of section 939.645 already carry penalties under the Wisconsin Criminal Code. *Id.* Once a crime is punished under the Code, the enhancement statute provides an additional and separate penalty for "what the legislature has deemed to be offensive thought" in violation of the First Amendment.

State of Wisconsin v. Mitchell, 485 N.W.2d 807, 811 (1992).

Counsel for Mitchell and the Wisconsin Supreme Court mischaracterize and misconstrue the Wisconsin law. They fail to recognize that there is a fundamental difference between making speech the crime itself and using speech as evidence to prove the crime. The penalty enhancement statute is not concerned with speech. It is concerned with an act of discrimination. Defendant's bigoted thought, speech or motive is not what is punished by the Wisconsin statute; the offender's act of discrimination is. Section 939.645 does not punish personal prejudice. It only punishes the bigot who acts on his or her thoughts by discriminating in the selection of crime victims. Mitchell is not being punished for

expressing his views. He is being sanctioned for his act of battering an individual because of that person's race.

Granted, speech made by the criminal offender in connection with a crime may be used as circumstantial evidence to prove that the offender "intentionally selected" a crime victim because of that victim's race, religion and the like. But it is an impermissible leap in logic to then conclude that the effect of the penalty enhancer is to punish the defendant's words rather than the act of discrimination. Words are routinely used as evidence to prove crimes, consistent with the First Amendment. For instance, the words "I'm going to kill you" can be used by the state to prove that the speaker committed the

crime of attempted murder. *State of Oregon v. Plowman*, 314 Ore. 157, __ P.2d __, 1992 WL 207677 (1992). Dissenting Judge Bablitch of the Wisconsin Supreme Court in *State of Wisconsin v. Mitchell*, 485 N.W.2d 807, 822 n.3 (1992) points out that in sexual harassment cases words, themselves, are the proscribed conduct. He goes on to explain that words are not simply evidence of the crime of sexual harassment. They are the crime of sexual harassment. For instance, in *Volk v. Coler*, 845 F.2d 1422, 1426-27 (7th Cir. 1988), the plaintiff claimed that her supervisor called her and other female employees "honey," "babe" and "tiger." Yet, with regard to sexual harassment jurisprudence, no contentions have been successfully raised that freedom of

speech is being unconstitutionally abridged or chilled.

In connection with the statute at issue here, even if words are used to prove intentional selection of a crime victim, the speech itself is not what is penalized by the statute. Under the penalty enhancer, bigots are free to think, speak, publish or broadcast their biased views. It is only when an individual commits a crime and selects the victim because of certain characteristics that the criminal is exposed to stiffer penalties.

In respondent's *Petition for a Writ of Certiorari to the Supreme Court of Wisconsin*, p.8, respondent provides an example of a penalty enhancer that would undoubtedly be struck down as an unconstitutional restriction of speech and then reasons that this enhancer is comparable to the

Wisconsin statute. Respondent's hypothetical law prohibits "public burning" and provides a penalty enhancer whenever a person commits the offense of public burning "because of" opposition to government policy.

Counsel for Mitchell claims that the Wisconsin statute is analogous to the hypothetical enhancer in terms of its effect on expression. The analogy is, of course, absurd, and the comparison demonstrates the extent to which the respondent has misconceived the Wisconsin statute. The penalty enhancer related to public burning, by its own terms, punishes expression. The Wisconsin law, in contrast, punishes discrimination. Public burning because of opposition to the government may be characterized as symbolic speech, which is protected by the First Amendment. Intentionally

selecting a crime victim because of that victim's race, religion or other noted characteristic has never been construed as speech, symbolic or otherwise, which is entitled to First Amendment protection.

II. THE WISCONSIN PENALTY ENHANCEMENT STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS FUNDAMENTALLY DISTINGUISHABLE FROM THE CONTENT-BASED, HATE CRIMES STATUTE STRUCK DOWN IN *R.A.V. v. CITY OF ST. PAUL, MINNESOTA*.

In *R.A.V.*, the United States Supreme Court struck down, on First Amendment grounds, a statute which made it a misdemeanor to place on public or private property a "symbol, object, ... graffiti, including, but not limited to, a burning cross or Nazi swastika which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or

gender." *R.A.V. v. City of St. Paul, Minnesota*, __ U.S. __, 112 S. Ct. 2538 (1992). The Court found that the St. Paul statute prohibited a subclass of "fighting words" which expressed messages of specific types of group hatred. *Id.* at 2548. The Court pointed out that the ordinance did not prohibit the use of "fighting words" or displays to communicate antagonism on the basis of political affiliation or homosexuality, for example, and that, therefore, the statute was a content-based restriction of speech. *Id.* at 2547. The Court further held that the content discrimination was not necessary to achieve St. Paul's compelling interests and struck down the statute as violative of the First Amendment. *Id.* at 2550.

The St. Paul ordinance is a breed apart from the Wisconsin penalty enhancement law. By its own terms, the St. Paul statute is directed squarely at the substance of speech. It singles out for prohibition certain "fighting words" based on the content of the message communicated. The Wisconsin law, on the other hand, is not aimed at a category of speech. It is not concerned with expression. Its focus, rather, is on discrimination in the context of criminal activity. The penalty enhancement law does not punish an individual for expressing hatred through legal channels, such as speech and publication. Section 939.645 only penalizes one who expresses bias through criminal action. Thus, the Court may uphold the constitutionality of the Wisconsin penalty enhancer consistent with its decision in *R.A.V.*

Even if the Court were to conclude that the Wisconsin statute restricts speech on the basis of its content, the penalty enhancer would pass constitutional muster under the strict scrutiny test. The penalty enhancer "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, __ U.S. __, __, 112 S. Ct. 501, 509 (1991) (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 107 S. Ct. 1722, 1728 (1987)). The State of Wisconsin has a compelling interest in eradicating discrimination. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Discrimination in the selection of crime victims may hamper the exercise of civil rights to the same extent that discrimination in

public accommodations, education, housing or employment interferes with fundamental freedoms. When citizens are subject to random attacks because of their race, religion, color and the like by perpetrators with whom they have no affiliation, they may be deterred, out of fear and intimidation, from living in certain neighborhoods, walking or driving through particular areas and attending special public and religious institutions. The state has a compelling interest in ensuring that its citizens have the freedom to exercise their civil rights and in guaranteeing equal access to publicly available goods and services.

The Wisconsin statute is necessary to protect citizens from being the targets of hate crimes because it punishes, directly, the act of

discrimination involved in victim selection, permits judges to impose longer sentences on perpetrators of hate crimes and deters bias-motivated crime by enhancing penalties. Furthermore, the penalty enhancer is "narrowly drawn" to protect citizens from crimes motivated by hate. The fact that only certain victim characteristics are listed does not reveal a state preference for the expression of some ideas over others. Rather, the state seeks to address the burgeoning problem of people being victimized specifically because of their race, religion, color, disability, sexual orientation, national origin and ancestry. What more narrowly tailored way to combat crime committed because of certain characteristics possessed by the victim then to provide for enhanced penalties

when it is proven that the perpetrator selected the victim because of these very characteristics. If the state were to include other victim traits, such as political affiliation, in its penalty enhancer when citizens are not being harmed because of these affiliations, the statute would not be "narrowly drawn."

Respondent, in its Petition for a Writ of Certiorari to the Supreme Court of Wisconsin p.14-15, suggests that the state could just as well achieve its interests by enacting a "content-neutral" penalty enhancer which would increase the criminal penalty for crimes committed "with a specific intent to create a terror within the community." But this enhancer would not serve Wisconsin's interest. Even if the perpetrator did not have the

larger intent of creating a terror within a community, but intended only to harm the individual victim because of that person's race or other such characteristic, the effect on members of the victim's group would be the same. Fear and intimidation would be felt by group members regardless of whether the perpetrator's intent reached as far as the entire community or was restricted to the individual victim.

III. THE WISCONSIN PENALTY ENHANCEMENT STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE, CONSISTENT WITH THE COURT'S DECISION IN *DAWSON v. DELAWARE*, IT DOES NOT PUNISH ABSTRACT BELIEFS.

In *Dawson v. Delaware*, __ U.S.__, 112 S. Ct. 1093 (1992), the United States Supreme Court held that the defendant's First Amendment rights were violated when the prosecution

introduced evidence, at a capital sentencing proceeding, of defendant's membership in an organization called the "Aryan Brotherhood." Defendant Dawson is white and was convicted of murdering a white female. The Court found that Dawson's First Amendment rights were violated by the admission of Aryan Brotherhood evidence because there was no demonstrated relationship between defendant's gang membership and the murder of his white victim.

Specifically, the Court held the admission of Aryan Brotherhood evidence violative of the First Amendment because "the evidence proved nothing more than Dawson's abstract beliefs." *Id.* at 1098. Under *Dawson*, therefore, the Constitution forbids the consideration in sentencing of evidence concerning a defendant's beliefs when

those beliefs have no proven connection to the underlying crime.

Consistent with the Court's holding in *Dawson*, under the Wisconsin penalty enhancement statute, a criminal offender's "abstract beliefs" do not trigger a potential increased sentence because they fail to prove intentional selection of a crime victim. A perpetrator does not receive greater punishment under section 939.645 merely because he or she held or expressed biased beliefs prior to the commission of a criminal act. An individual may harbor prejudicial thoughts, voice biased views, join bigoted organizations and then commit a crime. But these facts, alone, do not subject the individual to enhanced penalties under the Wisconsin statute. *State of Wisconsin v. Mitchell*, 485 N.W.2d 807,

818 (1992) (J. Abrahamson, dissenting). For instance, assume the existence of a fervent anti-Semite who, on numerous occasions, has been heard to make such derogatory remarks as "dirty, bastard Jew" and "money-grubbing kike." Suppose further that the individual is a member of the "Wipe the Jews Off the Face of the Earth" association. Late one evening that individual spots a woman parking her \$40,000 porsche on a poorly lit street. As the woman steps out of her car, he notices that her purse is dangling loosely from her shoulder. He sneaks up behind her, grabs the purse and runs off with it. It turns out that this woman is Jewish. The perpetrator may be prosecuted for robbery. But he would not be subject to increased penalties under the Wisconsin statute because he did not

"intentionally select" his victim "because of" her "religion." The offender's bigoted beliefs, denigrating speech and membership in an anti-Semitic organization were unrelated to his decision to rob the victim, who happened to be Jewish. Because these factors were extraneous to victim selection, they fail to hold up as a valid argument for greater penalization. Clearly, the penalty enhancer does not have the effect of punishing the "abstract beliefs" of criminal offenders.

Although the "abstract beliefs" of a defendant may not be considered in sentencing, evidence of racial intolerance may be admitted in a sentencing proceeding where such evidence is relevant to a motive for committing a crime. *Dawson v.*

Delaware, __ U.S. __, __, 112 S. Ct. 1093, 1097-98 (1992). In *Dawson*, the defendant argued that the "Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment." *Id.* at 1097. The Court disagreed, replying that "this submission is ... too broad." *Id.* The Court further held that:

[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.

Id. Thus, although "abstract beliefs" are not admissible at sentencing, the fact that expression is protected by the First Amendment does not, alone, prevent its consideration

in sentencing when directly linked to the commission of a crime.

In this case, Mitchell was motivated by racial antipathy. His statements immediately preceeding the battery clearly evidenced this race hatred. Mitchell's words, therefore, were absolutely central to his criminal motivation and are not barred from admission as evidence by the First Amendment.

IV. THE WISCONSIN PENALTY ENHANCEMENT STATUTE IS NOT VIOLATIVE OF THE FIRST AMENDMENT BECAUSE IT DOES NOT PUNISH THOUGHT ANY MORE THAN DO CONSTITUTIONALLY VALID ANTIDISCRIMINATION STATUTES.

The majority in *State of Wisconsin v. Mitchell*, 485 N.W.2d 807, 817 (1992) attempts to distinguish antidiscrimination statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2 and

comparable state statutes from the Wisconsin penalty enhancer. The majority argues that antidiscrimination statutes punish a discriminatory act, whereas the Wisconsin statute punishes "selection." *Id.* at 816-17. "Selection," in the court's mind, is not an objective act but, rather, a "subjective mental process." *Id.* The court therefore concludes that the penalty enhancer criminalizes subjective bigoted thought in violation of the First Amendment. *Id.*

Far from creating an Orwellian thought crime, the Wisconsin law punishes the act of discrimination in the context of criminal activity. As discussed earlier, intentional selection of a crime victim because of that person's race, religion or other noted characteristic is an act of

discrimination based on biased thought. Discrimination in the selection of a victim is no more of a thought and no less of an action than is discrimination in employment, housing, or any other area. Private deliberations that preceed the intentional selection of a victim because of that person's race are protected thought just as are private deliberations that preceed the firing of an employee because of that worker's race. But responding to such thoughts by either criminally victimizing or firing a person on account of the individual's race is an act of discrimination which may be punished consistent with the First Amendment.

Inherent in all acts of discrimination are preceeding discriminatory thoughts which, in

essence, get punished by antidiscrimination laws. To the extent that bigoted thoughts underlying the act of discrimination are, in effect, punished when discrimination is made illegal, the interference with thought is only incidental to the government's larger purpose of sanctioning unprotected conduct. The Wisconsin penalty enhancer does not punish prejudicial thought any more than do antidiscrimination laws that prohibit hiring or firing because of race, religion and the like. Just as the words of the alleged discriminator may be used to prove violations of antidiscrimination statutes, the words of the criminal offender may be used as circumstantial evidence to prove discrimination in the victim selection process. Both the Wisconsin statute and other antidiscrimination laws

punish the act of discrimination. They do not penalize the underlying thought, which is only incidentally affected, nor the speech, which is merely used to prove biased conduct. The only difference between the Wisconsin statute and other constitutionally valid laws prohibiting discrimination is the context in which the discrimination is penalized.

CONCLUSION

For the foregoing reasons, this amicus respectfully urges this Court to reverse the decision of the Wisconsin Supreme Court and uphold the constitutionality of the Wisconsin penalty enhancement statute section 939.645.

Respectfully submitted,

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